

July 15, 2005

Quinn M. Barrow
Richards, Watson & Gershon
355 South Grand Avenue, 40th Floor
Los Angeles, CA 90071-3101

**Re: Your Request for Advice
Our File No. A-05-102**

Dear Mr. Barrow:

This letter is in response to your request for advice on behalf of South El Monte City Councilmember Hector Delgado regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹

QUESTION

May you participate in decisions of the city council concerning the award of funding to the Boys and Girls Club of San Gabriel Valley?

CONCLUSION

You may not participate in decisions of the city council concerning the award of funding to the Boys and Girls Club of San Gabriel Valley.

FACTS

Hector Delgado is a member of the South El Monte City Council. He is also an employee of the Boys and Girls Club of San Gabriel Valley (the “Club”). The City of South El Monte receives Community Development Block Grant Funds (“CDBG funds”) that the city council

¹ The Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in sections 18109 through 18997 of title 2 of the California Code of Regulations. All regulatory references are to title 2, division 6 of the California Code of Regulations, unless otherwise indicated.

awards to a number of non-profit organizations during the consideration of its annual budget in June of each year. Over the last five years, the city council has awarded a portion of its CDBG funds to the Club, although Councilmember Delgado, based on your advice, did not participate in those decisions. Councilmember Delgado would now like advice from the FPPC regarding whether he should continue to abstain from participating in decisions of the city council concerning the award of funding to the Club.

ANALYSIS

The conflict-of-interest provisions of the Act are intended to ensure that public officials “perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (§81001(b).) To that end, section 87100 specifically prohibits any public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which the official knows, or has reason to know, that he or she has a financial interest. A public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s economic interests. (§87103; Reg. 18700, subd. (a).) The Commission has adopted a standard analysis for determining whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).)

Step One: Is Councilmember Delgado a “public official?”

As a member of the South El Monte City Council, Councilmember Delgado is a “member, officer, employee, or consultant of a state or local government agency” and is therefore a “public official” subject to the conflict-of-interest provisions of the Act. (§ 82048; Reg. 18701, subd. (a).)

Step Two: Would Councilmember Delgado be making, participating in making, or influencing a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Reg. 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises, or makes recommendations to the decision-maker regarding the governmental decision. (Reg. 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Reg. 18702.3.)

By joining with other members of the city council to discuss and vote on whether to award funding to the Club, Councilmember Delgado would be making and participating in a governmental decision as defined in the Act.

Step Three: What are Councilmember Delgado's economic interests?

As set forth in section 87103 of the Act, there are six different types of economic interests that may serve as the basis for a conflict of interest. One such interest is any source of income to an official aggregating \$500 or more within 12 months prior to the time that a governmental decision is being made. (§87103, subd. (c) and Reg. 18703.3, subd. (a)(1)). You have advised us that Councilmember Delgado is an employee of the Club, although you have not disclosed how much income he receives from that employment. Nonetheless, we will assume that he receives at least \$500 in income from the Club within a 12 month period, and that he therefore has an economic interest in the Club.

Step Four: Are Councilmember Delgado's economic interests directly or indirectly involved in the decision?

In order to determine if the reasonably foreseeable financial effect of a governmental decision on an official's economic interest is material, one must first determine if the official's economic interest is directly involved or indirectly involved in the governmental decision. (Reg. 18704, subd. (a).) Under Regulation 18704.1, subdivision (a), a source of income is directly involved in a decision before an official's agency when that entity or source, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license permit, or other entitlement to, or contract with, the subject person.”

The decision at issue is whether to award a portion of the city's CDBG funds to the Club. As such, the Club is the subject of this decision, and therefore is directly involved in the decision.

Step Five: Will the financial effect of the decision on Councilmember Delgado's economic interest be material?

Once the degree of involvement is determined, step 5 of the conflict of interest analysis addresses the applicable materiality standard. Regulation 18705.3 sets forth the materiality standards for economic interests in sources of income. Under subdivision (a) of that regulation, any reasonably foreseeable financial effect of a governmental decision on a source of income that is directly involved in the decision is deemed to be material. This means that if the decision to award CDBG funds to the Club will have any reasonably foreseeable financial effect on the Club, then that financial effect will be material.

Step Six: Will the financial effect of the decision on Councilmember Delgado's economic interest be reasonably foreseeable?

An effect is considered "reasonably foreseeable" if the effect is "substantially likely." (Reg. 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made is highly situation-specific. A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. In this case, a decision concerning whether the city will award CDBG funds to the Club will necessarily have a financial effect on the Club. So it is reasonably foreseeable that the decision will have a material financial effect on the Club, such that Councilmember Delgado has a disqualifying conflict of interest in the decision, which would require him to disqualify himself from the matter unless an exception allows him to be involved nonetheless.

Steps Seven & Eight: Public Generally & Legally Required Participation

An official who otherwise has a conflict of interest in a decision may still participate under the "public generally" exception. This exception applies when the financial effect of a decision on a public official's economic interests is substantially similar to the effect on a significant segment of the public. You have not provided any facts suggesting that this exception would apply to the award of CDBG funds to the Club.

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the "legally required participation" rule. This rule applies only in certain very specific circumstances where the government agency would be paralyzed from acting. Your account of the facts does not suggest that this exception would apply.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Steven Benito Russo
Senior Commission Counsel
Legal Division

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Corrected: July 15, 2005

² This is a revised letter, due to the wrong header number on pages 2 - 4 on the previous letter that was sent May 31, 2005.